

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Billed Party Preference
for 0+ InterLATA Calls

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CC Docket No. 92-77
Phase I

**REPLY TO AT&T'S OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

Capital Network System, Inc. ("CNS"), by its undersigned attorneys, hereby replies to "AT&T's Opposition to Petitions for Reconsideration" ("Opposition") filed on March 11, 1993, in the above-captioned proceeding.

CNS is an interexchange carrier ("IXC") headquartered in Austin, Texas. Its primary business is the provision of high quality, operator-assisted calling services to the public. As a competitive operator services provider ("OSP"), CNS has continued to receive literally thousands of calls each day from American Telephone & Telegraph Company ("AT&T") cardholders who -- using the "O+" dialing instructions on their Card Issuer Identifier ("CIID") cards -- are connected automatically to CNS's network. Because AT&T continues to refuse to provide CNS with the information it needs to complete these CIID card calls and because the FCC has failed either to prohibit AT&T from using CIID cards or to require the implementation of the "O+ public

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domain" proposal, CNS still must spend between \$100,000 and \$200,000 each month (depending upon the calling volumes for the particular month) in expenses to transfer calls to AT&T. ^{1/}

Despite the Commission's own recognition that AT&T's CIID card dialing instructions have created "an immediate competitive problem" that "cannot be eliminated unilaterally by AT&T's competitors," ^{2/} its November Order improperly and unlawfully failed to establish regulations that would eliminate these anticompetitive problems. Given the Commission's refusal to take the necessary measures to remedy the severely anticompetitive results of this problem, numerous OSPs and other parties petitioned for review of the Commission's decision. In its Opposition, AT&T argues, inter alia, that these petitions should be denied because they raise no new facts. ^{3/} While the factual evidence has not materially changed, reconsideration is compelled here because the Commission failed to weigh properly the record evidence in its possession prior to its November Order and, as a consequence, acted arbitrarily and capriciously.

Similar to Southwestern Bell's Petition for Reconsideration in this proceeding, ^{4/} AT&T's Opposition is

^{1/} See CNS Comments at 1-7 and CNS Reply Comments at 1-8.

^{2/} Report and Order and Request for Supplemental Comment, 7 FCC Rcd 7714, 7720 (1992) ("Order").

^{3/} Opposition at 3-4.

^{4/} "Petition for Reconsideration of Southwestern Bell Telephone Company" filed on January 11, 1993. CNS filed an opposition to this Petition on March 19, 1993.

based on a faulty premise because it assumes that the FCC's decision to reject the "0+ public domain" proposal was lawfully sufficient and sound as a matter of policy. In fact, the Commission's Order is unlawfully arbitrary and capricious because, contrary to the record evidence, it fails to give proper weight to the severe anticompetitive harm that AT&T's behavior continues to cause to the "0+" market and to the enormous costs AT&T's behavior continues to impose on its smaller, non-dominant competitors. ^{5/}

Instead, the record in this proceeding overwhelmingly demonstrates that to solve the problems caused by AT&T's anticompetitive use of CIID cards the Commission must, at a minimum, establish "0+ public domain" access requirements on the use of AT&T's CIID cards. ^{6/} Where, as here, an agency offers an explanation for its decision that runs counter to the evidence already before the agency, then its decision must be rejected as arbitrary and capricious. ^{7/} For this reason, CNS opposes the

^{5/} In its Opposition, Sprint Communications Company ("Sprint") expresses concern that the requirements of "0+ public domain" could be applied to it. Sprint Opposition at 2-3. Such concern is misplaced because, by virtue of its lack of market power, there is no reason to require Sprint or any other non-dominant OSP issuing calling cards usable with "0+" access to be subject to "0+ public domain" access.

^{6/} See CNS Reply Comments at 10-18. See also Petition for Reconsideration of Competitive Telecommunications Association ("CompTel") at 7-16; Petition of LDDS Communications, Inc. ("LDDS") at ii-iii; Petition of Value-Added Communications, Inc. at 1, 3.

^{7/} See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

Opposition filed by AT&T and supports the petitions for reconsideration filed by others in this proceeding who have requested that the Commission revisit its refusal to adopt the "0+ public domain" proposal. ^{8/}

Moreover, AT&T's claim that "0+ dialing is consistent with proprietary cards" ^{9/} is contradicted by its own Opposition. First, AT&T challenges the statement of CompTel ^{10/} that the operator services industry has never operated on the unstated principle of "0+ public domain." ^{11/} After failing to cite any precedent for this bald assertion, AT&T then contradicts itself by acknowledging that, prior to the issuance of its CIID cards, AT&T's old joint use calling cards indeed could be validated and accepted by its OSP competitors. ^{12/} Thus, contrary to AT&T's original statement, operator services customers did become accustomed to the ease and convenience of "0+ public domain" -- ease and convenience which disappeared when AT&T flooded the market with a so-called "proprietary" "0+" calling card in furtherance of its anticompetitive marketing strategy.

^{8/} See, e.g., CompTel Petition at 21; LDDS Petition at 1-2; Petition of MCI Telecommunications Corporation ("MCI") at 1; Petition of PhoneTel Technologies, Inc. ("PhoneTel") at 8.

^{9/} Opposition at 4.

^{10/} CompTel Petition at 7-8, 14.

^{11/} Opposition at 4.

^{12/} Id.

Second, AT&T asserts that its calling card is consistent with "0+" access and is like all other proprietary calling cards because it "can only be used on a 0+ basis at telephones that have been presubscribed to AT&T." ^{13/} AT&T itself contradicts this assertion, however, when it later admits that several domestic IXCs, namely, Alascom and GTE Airfone, are permitted to honor AT&T's CIID cards. ^{14/} Furthermore, AT&T acknowledges that, through Mutual Honoring Agreements, it also permits LECs to validate its CIID card for local and intraLATA calls. ^{15/} Indeed, it is only because of the existence of these Mutual Honoring Agreements that Southwestern Bell ("SWB") felt compelled to file a petition in this proceeding. SWB's petition asked the Commission to verify the dialing instructions that AT&T provides its CIID cardholders to advise that local and intraLATA calls can be completed on a "0+" basis from SWB public phones. ^{16/} Thus, far from being truly proprietary, AT&T's CIID cards can be validated for certain types of telephone calls from virtually every telephone in the country -- regardless of the presubscribed carrier. Accordingly, based on its own admissions, AT&T's CIID cards represent a substantial departure from past industry practice, a departure which unlawfully burdens both

^{13/} Id. at 5.

^{14/} Id. at 11 n.27.

^{15/} Id. at 12 n.28.

^{16/} See Southwestern Bell Petition at 4 (filed on January 11, 1993). CNS filed an opposition to this Petition on March 19, 1993.

consumers and other OSPs and which is inconsistent with the notion of a truly proprietary calling card.

Finally, AT&T's conclusory arguments that the Commission correctly analyzed the costs and benefits of "0+ public domain" ^{17/} must also be rejected as unsupported by the record evidence. As correctly explained in other OSPs' petitions for reconsideration, the Commission's failure to take appropriate action in its Order was based on the incorrect, factual conclusion that the costs of the "0+ public domain" proposal were greater than its benefits. ^{18/} For example, the Commission's Order (and AT&T's Opposition) ignore the important public safety benefit provided by "0+ public domain," namely, the ability of a cardholder to place an operator-assisted call using an alternate carrier when the network of its presubscribed IXC has suffered an outage and is unable to complete the cardholder's call. ^{19/}

In light of its previous conclusions as to the propriety of AT&T's marketing practices, it was particularly arbitrary for the Commission to rely on the argument that customers who seek to use CIID cards already have chosen their preferred OSP. ^{20/} Just three days prior to its Order, the

^{17/} Id. at 5-10.

^{18/} CompTel Petition at 16-20; Petition of International Telecharge, Inc. at 4-5; MCI Petition at 2. See also CNS Reply Comments at 10-18.

^{19/} See PhoneTel Reply to Oppositions to Petition for Reconsideration at 3.

^{20/} Order, 7 FCC Rcd at 7723. See also Opposition at 7.

Commission formally admonished AT&T for marketing practices that "may have persuaded many consumers to unnecessarily destroy or discard otherwise valid calling cards issued by AT&T jointly with the BOCs or, in some cases, by the BOCs individually" and that caused "widespread consumer confusion and dissatisfaction." ^{21/} AT&T's statement in its Opposition that "[c]ustomers who want to place 0+ calls from any phone can readily obtain a LEC card or use other billing mechanism such as commercial credit cards, collect calling or third party billing" ^{22/} conveniently overlooks its past deceptive marketing campaign that, by its own estimate, caused eight million LEC cardholders to destroy their cards ^{23/} and led to the FCC's Letter of Admonishment. Furthermore, the other options presented by AT&T are, to a large extent, inadequate substitutes. Consumers are generally reluctant to charge telephone calls to credit cards, and collect calling and third party billing can be significantly more expensive than calls billed to calling cards. ^{24/}

^{21/} Letter of November 3, 1992 from Donna R. Searcy, Secretary, FCC, to Robert E. Allen, Chairman and Chief Executive Officer, AT&T, at 3 ("Letter of Admonishment").

^{22/} Opposition at 8.

^{23/} See Order, 7 FCC Rcd at 7719 (in describing AT&T's arguments, the FCC euphemistically refers to AT&T's campaign to have LEC cardholders destroy their cards as a "card replacement program").

^{24/} Indeed, AT&T's most recent FCC monitoring report, dated September 21, 1992, shows a substantial cost differential between these various types of calls. AT&T adds a fixed charge of \$3.00 for person to person calls (which presumably would include third party calls) and a charge of \$1.88 for operator station calls

Similarly, AT&T's Opposition erroneously relies on the Commission's argument that other forms of access would be too inconvenient for AT&T cardholders. ^{25/} As previously described by CNS, ^{26/} this argument is arbitrary because the Commission never explained why access code calling would be too great an inconvenience for AT&T's 25 million cardholders -- great enough to tip the cost/benefit analysis away from the "0+ public domain" proposal -- but, at the same time, provides an easy and convenient form of access for the 32 million MCI and Sprint cardholders who use access code dialing. ^{27/} Moreover, should AT&T wish to save its cardholders the purported inconvenience of using access codes, it may do so consistent with "0+ public domain." AT&T may continue to rely on "0+" access under "0+ public domain" -- on the condition that it provide the same information to all IXCs completing calls charged to CIID cards that it has already been providing to LECs and certain IXCs. Given the substantial evidence supporting "0+ public domain" in this record, AT&T's efforts to provide a reasoned basis for the November's Order must fail.

^{24/} (...continued)

AT&T's fixed service charge for calling card calls is far lower, only \$0.80 per call.

^{25/} Opposition at 10.

^{26/} See CNS's "Opposition to Petition for Reconsideration of Southwestern Bell" at 5.

^{27/} Order, 7 FCC Rcd at 7717.

For the reasons discussed above, CNS requests that the Commission deny AT&T's Opposition and grant the petitions of these parties, like CNS, who are asking the Commission to adopt the "0+ public domain" proposal.

Respectfully submitted,

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April 1, 1993

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CERTIFICATE OF SERVICE

I, Roseanne Markham, hereby certify that a copy of the foregoing Reply to AT&T's Opposition to Petitions for Reconsideration of Capital Network System, Inc. has been served by first class mail, postage prepaid, on this First day of April 1993 to the following:

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